

The Research Foundation of the City University of New York and Professional Staff Congress of New York. Case 2–RC–22721

June 29, 2007

**DECISION ON REVIEW AND
ORDER REMANDING**

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW
AND WALSH

On March 29, 2005, the Regional Director for Region 2 issued a Supplemental Decision and Direction of Election finding that the petitioned-for research assistants (RAs) employed by the Research Foundation of the City University of New York at the Graduate Center of the City University of New York (CUNY) are employees within the meaning of Section 2(3) of the Act. The Regional Director found that the Board's decision in *Brown University*, 342 NLRB 483 (2004), which found that graduate student assistants are not statutory employees, is inapposite to this case. The Regional Director also reaffirmed her June 29, 2004 Decision and Direction of Election, in which she found that the single-facility presumption as applied to the Graduate Center has not been rebutted, that the classifications in the petitioned-for unit constitute an appropriate unit, and that the RAs are not temporary employees. The Regional Director also reaffirmed her earlier findings regarding the supervisory and/or managerial status of certain individuals in the petitioned-for unit.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Supplemental Decision and Direction of Election. The Petitioner filed an opposition.

By Order dated September 20, 2005, the Board¹ granted the Employer's request for review of the Regional Director's finding that the RAs are employees within the meaning of Section 2(3) of the Act. The Order stated that the Employer's request for review regarding the scope and composition of the unit and the supervisory, managerial, and temporary status of the employees included in the unit would be held in abeyance pending the resolution of the employee status of the RAs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we affirm the Regional Director's finding that the RAs are employees within the meaning of Section 2(3) of the Act. As we explained in *Research Foundation of the State University of New York*, 350 NLRB 197 (2007), issued

today, research project assistants (RPAs) employed by that employer, which serves the same function for the State University of New York (SUNY) that the Employer in this case serves for CUNY, are statutory employees within the meaning of Section 2(3) of the Act. We found that the Board's decision in *Brown* did not apply because, unlike *Brown*, the employer in *Research Foundation of the State University of New York* is not an educational institution, and the RPAs have a primarily economic and not a primarily educational relationship with their employer. We reach the same result here for the same reasons: the Employer is not an educational institution, and the RAs have an economic and not an educational relationship with the Employer.²

With regard to the issues held in abeyance, the Employer's request for review raises substantial issues solely with regard to the supervisory status of Diana Cassells, Gregory Umbach, Carl Skoggard, Andre Balog, Ken Yarmy, Tatiana Carayannis, and Barbara Leopold, and the supervisory and managerial status of Lawrence Cowen and Sarah Dwyer. We conclude, however, that these issues can best be resolved through the challenge procedure. Accordingly, the Supplemental Decision is amended to permit Cassells, Umbach, Skoggard, Balog, Yarmy, Carayannis, Leopold, Cowen, and Dwyer to vote by challenged ballot, and the Employer's request for review is denied in this and all other respects.

ORDER

The Regional Director's finding that the research assistants are statutory employees is affirmed. The Supplemental Decision is amended to permit Cassells, Umbach, Skoggard, Balog, Yarmy, Carayannis, Leopold, Cowen, and Dwyer to vote by challenged ballot, and the Employer's request for review is denied in this and all other respects. This case is remanded to the Regional Director for further appropriate action.

CHAIRMAN BATTISTA, concurring.

I agree with my colleagues that the research assistants (RAs) are statutory employees, because their relationship with the Employer is primarily economic rather than educational. However, my reasons differ from those of my colleagues.

My concurrence is grounded in *Brown*¹ and in my dissenting opinion in *Research Foundation of the State University of New York (SUNY)*, 350 NLRB 197 (2007). In

² Member Walsh dissented in *Brown* and, for the reasons stated in that dissent, would find the RPAs in *Research Foundation of the State University of New York*, as well as the RAs in this case, to be statutory employees in any event. He nevertheless agrees that *Brown* is distinguishable from this case.

¹ *Brown University*, 342 NLRB 483 (2004).

¹ Chairman Battista, Members Liebman and Schaumber.

that case, I found that the research project assistants (RPAs) were not employees. The instant case had some similarities to that case. Like the employer in *Research Foundation of SUNY*, the Employer here is an “educational corporation.” Its mission must be “in keeping with the educational purposes and objects of [CUNY].” However, unlike the employer in *Research Foundation of SUNY*, some of the RAs here are enrolled at universities other than the City University of New York (CUNY). That is, status as a CUNY student is not a requisite for working for the Employer. In addition, the RAs perform administrative and editorial work that is typically unrelated to their studies. Although their work is overseen by a grant recipient on the CUNY faculty,

that faculty member does not also act as the dissertation adviser. Moreover, the RAs here work with nonstudents who are assigned the same work, and they are paid on an hourly basis at a rate similar to the nonstudents. Rather than financial support for their graduate studies, their compensation thus represents payment in consideration for hours worked. In fact, for financial aid purposes, work as an RA is treated as outside employment.

On this basis, I agree with my colleagues that the relationship between the RAs here and the Employer is primarily economic, and that the RAs are employees under Section 2(3) of the Act.